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ASSOCIATIONS FOR EXPORT TRADE.

Much interest is being taken by business men in the larger commercial centers in the organization of associations for export trade under the provisions of the so-called Webb Act.

This Act, approved April 10, 1918, provides that the Sherman Act prohibiting unlawful restraints and monopolies shall not be construed "as declaring illegal an association entered into for the sole purpose of engaging in export trade" or to an "agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association."

This act is intended to enable the United States to compete with the great governmental controlled corporations of Europe who by reason of their great capital and the pooling of all trade interests into a large selling and banking organization were able to monopolize the export business of the world and that, too, right under our nose, in South America.

Many of such associations will be formed, no doubt, all over this country, with the banks taking the initiative in most cases; for it is well known that the inability of our merchants to secure proper banking facilities to discount their foreign credits was responsible for the loss of much export business. In order to permit banks and other corporations to join as organizations in the formation of export trade associations, the Webb Act further provides that the Act of October 15th, 1914, prohibiting corporations from holding stock in other corporations under certain conditions, shall not be construed to forbid "the acquisition or ownership by a corporation of the whole or any part of the stock or other capital of any corporation organized solely for the purpose of engaging in export trade."

After forming such an association it is the duty of the organizer within thirty days to "file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all of its stockholders or members, and if a corporation, copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association."

To enable organizations to be formed as domestic corporations in some states the legislatures, many of whom are now in session, should repeal or amend any laws which forbid banks or other domestic corporations from holding stock in other corporations or which will in any other way prevent local corporations or individuals from taking advantage of the provisions of this Act.

This is a day of unparalleled opportunity for the United States from a business point of view. Our business competitors, including those countries allied with us in the recent World War, are prostrate financially and the United States stands forth today as the greatest and richest nation on the face of the earth. Yet in spite of her great wealth, power and prestige, she has had the smallest merchant marine of any of the great powers, and her export trade with the smaller nations has been quite insignificant

and has usually been transacted through export associations of European nations and on foreign-owned ships. All this was brought about by the unnecessary stringency of our laws preventing monopolies and contracts in restraint of trade, which, by the Webb Act, are happily restricted to organizations doing a domestic business. This permits the necessary combinations of merchants and capital to enable the exporters of this country effectually to meet competition from any quarter.

NOTES OF IMPORTANT DECISIONS.

HOW FAR A STATE CAN TAX NATIONAL BANKS.—The overwhelming demand which arose at the close of the civil war that Congress should release the property of national banks resulted in 1864 in an act which, while exempting the banks themselves from being taxed except for real estate owned by them, permitted the state to tax the shares of such banks "as the personal property of the holder or owner of such shares." This statute has been the subject of much construction and many attempts have been made to evade it. The latest and most important case on this subject is Bank of California v. Richardson, Treasurer, 39 Sup. Ct. Rep. 165. In this case the state of California by statute provided that the value of the shares of stockholders in a national bank should be assessed on the basis of the assessed valuation of assets of the bank and that the bank shall be required to pay the tax so assessed and collect same from its stockholders.

In the case cited the plaintiff, Bank of California, owned 2,501 shares of stock in the Mills National bank, on which it was required to pay a tax as a shareholder. It also owned 1,001 shares of the stock of the Mission bank, a state banking organization on which it was also taxed as a stockholder. It was then taxed on all its assets, including the stock in other banks just named, in behalf of its stockholders. The plaintiff paid all these taxes under protest and then sued the state treasurer to refund them. The judgment of the supreme court of California denying plaintiff any remedy was reversed and modified in the following important particulars:

The taxation of the plaintiff on its stock in the Mills National bank was held to be proper under the act of congress which gave authority to the state to tax all "stockholders" in national banks.

The court holds that there was no authority in the state of California to tax plaintiff as a stockholder of a state banking corporation. This point was already determined by the decision of the court in Owensboro National Bank v. Owensboro, 173 U. S. 664, 19 Sup. Ct. Rep. 537, when it was held that section 5219 had the effect of exempting not only the operations and franchises but the property of national banks from state taxation, except as to their real estate.

The court further held that the stockholders of the plaintiff bank could not be taxed on an assessment of the assets of the plaintiff bank, which included the value of the stock held by plaintiff in the Mills National bank, on which plaintiff had already been taxed, although it was proper to include the value of the stock of the Mission bank. On this point the court said:

"Indeed, it is apparent that the use of the power conferred by the statute to tax the California Bank as a stockholder in the Mills National Bank and in addition to avail of such stock ownership for the purpose of taxing the shareholders of the California Bank, was but to accept the statute on the one hand, and to exert on the other a power which could have no existence consistently with the statute. To say that the two taxes, the one levied on the bank as a stockholder in the Mills National Bank, and the other levied on the stockholders of the California Bank, were valid because a taxation of different persons, the California Bank on the one hand and the stockholders of the California Bank on the other, serves only to emphasize the plain disregard of the statute which would result from the enforcement of the taxes in question.

"It is undoubted that the statute from the purely legal point of view, with the object of protecting the federal corporate agencies which it created from the state burdens and securing the continued existence of such agencies despite the changing incidents of stock ownership, treated the banking corporations and their stockholders as different. But it is also undoubted that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of ultimate beneficial interest, treated the stock interest, that is, the stockholder, and the bank as one and subject to one taxation by the methods which it provided."

IS A TRUSTEE IN BANKRUPTCY ENTITLED TO LIFE POLICIES OF BANKRUPT PAYABLE TO WIDOW? — It has now been definitely settled that the usual form of a life insurance policy which contains a

provision for change of beneficiary may become an asset in the hands of assured's trustee in bankruptcy and the latter may appropriate the surrender value of such policy to the payment of the bankrupt's debts. Cohn v. Malone, 39 Sup. Ct. Rep. 141.

The bankrupt defended this case on two grounds: First, that the cash surrender value was not property which could have been transferred by him prior to bankruptcy; and second, that the assignment to his wife could not be defeated by the trustee because protected by a statute of Georgia which provided that where money under a policy is directed to be paid to one's widow, "no other person can defeat the same." Justice McReynolds, adopting the language of the lower court, declared:

"We are of opinion that the provision quoted did not have the effect of conferring on the bankrupt's wife, as the result of her having been named as the beneficiary, a vested and indefeasible interest in policies by the terms of which the beneficiaries could be changed by the bankrupt at any time."

LESSEE'S LIABILITY AFTER ASSIGNMENT.

Where, to the knowledge of all parties, a lease has been negotiated *solely* for the benefit of a corporation to be organized *only* in case a satisfactory lease can be obtained; where such lease contains, separate from other covenants, a special written clause in the following terms: "It is mutually *agreed* that the lessee may assign his interest in this lease to a corporation *of which he is a member*," and also contains, in the printed form employed, covenants to pay rent, against assignment without consent, and making the lease binding upon "the heirs, *assigns* and legal representatives of the parties;" and where the corporation is organized as contemplated, immediately upon the delivery of the lease and forthwith becomes the assignee thereof, goes into immediate possession of the demised premises, has the only possession ever taken under the lease, and is dealt with as tenant thereafter, exclusively, in particular, the rental account being kept in its name in the books of lessor's agent, all statements and receipts being issued in its name, and its checks being taken in payment, for more than two years; can this lessee-assignor be held liable for rents subsequently accruing, and remaining unpaid?

This question was recently submitted to the writer, and upon investigation of the authorities, they were found in a somewhat uncertain and unsatisfactory state. There was found but one case which deals with the same, or even a substantially similar state of facts, although it would seem that the question presented is one which might arise rather frequently in modern business transactions, and which is, therefore, of some interest to the profession. For this reason, it has been thought not without profit to set out the results of the investigation, and the lines of reasoning followed in reaching a conclusion.

In the first place, it must be borne in mind that the corporation in question, prior to its organization, and authorization to do business, was incapable of becoming a party to a valid lease. This precise point was expressly decided in Utah Optical Co. v. Keith.[1] And the Court also indicates, though it does not decide, since the point was not involved, that such contemplated corporation could not even be a beneficiary under any trust arrangement for a lease, which position would seem logically to follow, *ex necessitate*, from the ground of the decision.

In this case, the corporation brought action for damages for an eviction from premises which it alleged it occupied as a sub-lessee. The first defense was that no lease had been made, inasmuch as, at the date of the alleged making of the lease, the plaintiff was not incorporated, and hence, had no capacity to take or hold a leasehold estate. It appeared that the lease was alleged to have been made March 1, 1895,

(1) 18 Utah 464, 56 Pac. 155.

and that the company had not been incorporated until March 15, 1895, although articles had been prepared and the corporation agreed to on March 1, 1895.

In reversing a judgment for plaintiff in the Court below, the Court says:

"The plaintiff, not being incorporated at that time, *had no capacity to take or hold a leasehold estate, or to perform any act; nor could anyone perform any act for it, as agent or otherwise.* Mitchell states that the lease was made to plaintiff through him as manager. He does not pretend that it was made to him in trust for the corporation thereafter to be formed. *It is very doubtful whether an anticipated corporation could be a cestui que trust.* One of the essential requisites of a lease, and in the absence of which no leasehold estate *can be passed from the lessor,* is the existence of someone being capable of taking and holding as lessee. *This essential element was lacking in this case, and therefore, no lease was made, or could have been made, to the plaintiff on the first day of March, 1895.*"

The principles involved are certainly clear and unequivocal from the very nature of corporations, and they are thoroughly well settled, and established by abundant authority. In one other case, African M. E. Church v. Conover,[2] the Court, among other authorities, cites Washburne on Real Property,[3] and quotes from this author the general rule, as follows:

"There must be a person *in esse* to give *as well as to receive a conveyance,* in order to make a deed of an immediate estate by *or to such person good.* And if there is any reasonable doubt of such person being *in esse* at the time of the delivery of the deed, it must be affirmatively shown that he was so, in order to give the deed validity."

Hence, it would appear that the parties to the lease in question adopted the only course which was open to them, in order that a valid binding lease might result in the hands of the corporation for which it was intended, after the latter should be organized, and the lease assigned to it was contemplated.

Of course, it may be said that an express release of the original lessee might have been executed, either separately, or as a part of the authority to assign, in which event the question could not arise. But the obvious answer to this would appear to be that the question of the liability of the formal lessee did not receive any consideration from either party at the time. He was undoubtedly considered merely as a means, a conduit so to speak, through which the leasehold should pass to the corporation when organized, and authorized to do business, to take the benefit of property, and become a tenant.

Reduced to its lowest terms, our question, then, amounts to this: In view of the law and facts stated, is the lessee, as a matter of law, released from liability for rentals accruing during the tenancy of the corporation? This question, in turn, depends upon another, which is two-fold in its character: Does the transaction disclose, either that the formal lessee never was such in law, or that there was a surrender by operation of law, that is, in respect to this last phase, did the formal lessee make a surrender, and the lessor accept the same, of the term, by a substitution of tenants, as a matter of law? And again we find, that this two-fold question depends upon still another: What was the intention of the parties, as disclosed by all of the facts and circumstances?

These questions will now be considered, though not precisely in the order named, since by so doing, it is believed that it will be possible most logically and intelligently to establish the necessary standards to enable us to arrive at an answer to what is regarded as the ultimate question.

The liability to pay rent for the use and occupancy of property is said to arise either by privity of estate, from the tenure of the leasehold with rents reserved, or by privity

(2) 27 N. J. Eq. 157.
(3) 6th Ed., Section 2121.

of contract, where the lease contains an express covenant to pay rent. The law in this regard is well stated in Whetstone v. McCartney,[4] as follows:

"There are two ways in which a lessee may be liable to his lessor: one arises from his express covenant to pay, whereby he is held in privity of contract; the other arises in the absence of an express covenant to pay rent, on an implied obligation whereby he is held in privity of estate. In the latter case, if he parts with the estate, with consent of lessor, thereby destroying the privity, there is no further obligation to pay rent, *since there is nothing upon which to base the obligation.* But if he has expressly covenanted to pay, the contract lasts *until discharged,* and the covenant may be said to run with the land, and this is so even though the lessor has consented to the assignment by the lessee and accepted rent of the assignee. The assignee is likewise liable to the original lessor for the term he occupies, not by reason of a promise, but by reason of the privity of estate. And the lessor may pursue one, or both, at the same time, though he will be entitled to but a single satisfaction."

Numerous other authorities to the same effect are to be found in the decisions of many states.

And in respect to the question of the forms of liability, it might be added that it is competent to bind an assignee to all the provisions of the lease by an appropriate term in the lease itself, and it appears that this was done in the case under consideration.

These rules pertaining to liability were adopted by the American courts early in their history from the rulings in England in previous cases. Its introduction here is well illustrated in the following language from Port v. Arthur:[5]

"When a landlord gives a lease, *he selects his tenant;* and it cannot be endured that he should afterward be deprived of his action on the *covenant to which he trusted.* Auriol v. Mills, 4 T. R. 98. *The lessee having the right to sell,* may bring in a tenant *altogether incompetent to the proper management of the land, and the payment of the rent;* and he again may sell to another person still more objectionable."

In this case, the Court was called upon to pass upon the question of liability under a long-time English lease, one to run for 1,690 years, in which there was *no covenant against assignment,* on which action had been brought in this country.

This case is evidently regarded as a leading case on the question, because it is cited in most of the discussions in the various courts, at least when the question comes before them as one of first impression.

The case of Auriol v. Mills, cited in the above quotation, has been, since its decision, considered a leading authority in England, and it is likewise very generally referred to by our Courts, to sustain the rules they lay down. The case was this: A lessee, having become bankrupt and assigned his property, including the lease, sought exoneration from his covenants to pay rent under the lease on the ground of the assignment. In holding him still liable, the Court says:

"All these cases"—(earlier English decisions)—"with one voice declare that if there be an express covenant, *the obligation on such covenant still continues.* And this is founded not on precedents only, *but on reason; for when a landlord grants a lease he selects his tenant; he trusts to the skill and responsibility of that tenant; and it cannot be endured that he should afterwards be deprived of his action on the covenant to which he trusted by an act to which he cannot object,* as in the case of an execution; so here the assignees are bound to sell the term, and perhaps they may assign it to a person in whom the lessor has no confidence."

We are now in a position to perceive and appreciate the real basis and foundation of the English rule, which was adopted in turn by the courts of this country. To safeguard the landlord's interests, and to carry out the *presumed intention* of the parties *under the circumstances then existing,* the courts reasoned and held that the covenant

(4) 32 Mo. App. 430.
(5) 17 Johns. (N. Y.) 238.

or agreement in reference to the payment of the rent was a separable contract between the lessor and the original lessee, which survived the assignment, and persisted in full vigor and effect afterward as well as before. *Under the circumstances,* this was good law. It was justice and equity. But it should be carefully noted that *it rested entirely upon facts and circumstances, constituting the then situation of the parties.*

If the facts and circumstances had been otherwise, had they been as they are, generally, today, it would have been quite as easy, and with quite as much justice and equity, to hold that the land demised was the subject of the contract, and the fund whence the rentals were derived, that the lease and all its terms and covenants was an entire one, and that it would be presumed, that after an assignment, with consent, there was no intent longer to hold the original lessee in any mode. And this under certain circumstances has actually been held in this country, as a result of construing all of the provisions of the lease *in the light of the attendant facts.*

In Worthington v. Hewes, et al.,[6] a 99-year lease, renewable in perpetuity, provided for an appraisement at 15-year intervals, as a basis for the determination of the rentals for the demised premises for the ensuing period. The lease contained an express covenant, binding upon the original lessee, "his representatives and assigns," to pay the rent. After an assignment of the lease, the question arose as to who was the proper party to an appraisement, the original lessee, or the assignee. The point was raised that if the original lessee was still liable for the rent, he should be a party to the appraisement. The court held the assignee the proper party, saying: "But is not the plain way out of this dilemma to be found in denying the continuing liability of the lessee? *It is simply a question of intention.*"

(6) 19 Ohio St. 66.

If, therefore, instead of being very long-term lease, as they customarily were in England when the rule was formulated and adopted, leases were for very limited terms, as they most frequently are in these modern days, if instead of being assignable at will of the lessee, and delivered with such understanding and intention, as were those old English leases, they were, by express covenant, *unassignable without the written consent of the lessor,* as most of the leases of the present day are, thereby giving the landlord full and complete opportunity to "select his tenant" still, because he could either refuse consent or attach terms thereto, the urge of justice and equity *would not then have appeared in favor of, but against,* holding the lessee still liable under the assumption of an intent to make the contract separable. And, if, in addition to the foregoing, it also appeared that the lease was known by the lessor to be sought not for any individual at all, but for a corporation to be organized in the event the lease was actually obtained, and if the lease, in its written body, expressly authorized the precise assignment that was made, the facts and circumstances become stronger still against any *presumed intention* of continuing the liability of the original lessee.

It is a familiar maxim that, when the reason for a rule ceases, the rule itself ceases. Hence, in connection with the foregoing line of reasoning, it certainly would not be too much to say that when the precise reason for the rule ceases, the application of the rule should *at least* yield to facts and circumstances which would fairly and reasonably indicate that the rule was never intended to be applicable.

The authorities are uniform that when there has been a *surrender* of the term, with an acceptance, or anything equivalent thereto, by the lessor, the original lease and all liability under it, cease at once so far as the original lessee is concerned. And it could not be otherwise, because, in the

words of Whetsone v. McCartney, *supra*, *"There is nothing upon which to base the obligation,"* it has been *"discharged."*

In an action upon an express covenant in a written lease, in which action, the final decision was upon the point that the defendant had failed *to properly plead a surrender*, the Court says: "A landlord may indeed accept a surrender even by parol, and if he does, *the term is gone into the reversion and the rent ceases.*"[7]

Indeed, it could not be thought otherwise. For, when the thing by reason of which the rent, and any liability for it, arises, has been *given up and extinguished*, it would be impossible for any liability whatever, in respect to any subsequent obligations claimed to have been incurred under it, to continue.

And a surrender of the term may be effected, and by parol, even though it occur through the assignment of a written lease.

In an action on covenant for rentals subsequently accruing under a written lease assigned by original lessee, with lessor's consent, by indorsement upon it in the following language: "For a valuable consideration I hereby assign to G. all my right, title and interest to the within lease. (Signed) L.", the case was withdrawn from the jury in the trial court, and upon appeal by the defendant, the Supreme Court, in reversing the judgment for the plaintiff, says: "Had the facts been submitted to the jury, there can be no doubt they would have found that Anderson *accepted Gorham as his tenant* with the assent of Logan; and *as this assent would have the same legal effect as if L. had actually surrendered the former lease*, it is equally clear that their verdict, under proper instructions, must have been for the defendant."[8]

The words "actually surrendered" must mean: Surrendered to the landlord personally, because the defendant had actually turned the lease over under his assignment to G., who the court finds had been accepted by the lessor "as his tenant" thereunder.

In the case of Logan v. Anderson, *supra*, the Court also makes use of the following language:

"As the facts were withdrawn from the jury, if it clearly appears to the Court that *A. accepted G. as his tenant* with the assent of L., *or* that G. took a new lease from A., with the assent of L., who agreed to the substitution, then, it is clear, such acceptance of a new lease, *though by parol*, would *operate as a surrender* of the former lease by deed."

From these cases, and others which might be cited, it appears that a surrender by a lessee depends upon an acceptance thereof by the lessor. And such is, of course, unquestionably the law. But this acceptance need not be, or be proved to be, in express terms, but may be proved and implied from facts and circumstances. In the case last cited, there was some evidence of a verbal agreement by the lessor to accept the assignee as his tenant exclusively, thereby accepting defendant's surrender, tendered through the assignment and change of tenants. But this verbal agreement is *not the basis of the decision*. That basis is stated to be the *fact* of acceptance, *not the form* in which it occurs and is established in the given case.

The language of the Court: "—accepted G. as his tenant," should be carefully noted. Because in some of the cases it will be found that the courts say that this is immaterial to prove a substitution of tenants, a surrender and release. The situation is no doubt due to a loose use of terms in the latter class of cases. Acceptance "as a tenant" may mean either of two things: It may mean that the lessor simply agrees that the party in interest, usually an assignee, may occupy the demised premises, with nothing more. Or, it may mean that the lessor agrees that the party in interest, assignee or otherwise, may enter the prem-

(7) Frank v. Maguire, 42 Pa. St. 77.
(8) Logan v. Anderson, 2 Doug. (Mich.) 100.

ises *as his tenant,* in the same sense and to the same extent of rights and liabilities as the original lessee before the change occurred. In this latter sense, the language is used in Logan v. Anderson, *supra.* In the former sense, it will be found to have been used in the other class of cases mentioned.

The rule respecting surrender and acceptance, where an assignment is involved, is well stated by an eminent authority, as follows:

"Whether the conduct of the landlord in connection with an assignment of the lease by the tenant does or does not amount to an acceptance of a surrender of the tenancy *depends wholly upon the intent present in such conditions.* But the intent of the parties is always controlling. The intent on the part of the landlord to accept a surrender *in cases where a lease has been assigned and the assignee has entered is wholly dependent upon the circumstances of each case.*"[9]

The same author also lays down the rule as to how a surrender and acceptance may be manifested and shown, as follows:

"A surrender of the lease may be made out *not only by an express agreement* between the parties to it, *but* by *some act* on the part of the party against whom the surrender is claimed. Under this rule, a surrender *need not be by express words, but may be implied from the conduct of the parties.* This latter species of surrender is called *a surrender* by operation of law, and it is said that if the acts of the parties would *reasonably permit* a surrender to be inferred, the court will construe their acts as being equivalent to a surrender."[10]

In discussing the circumstances and conditions under which such construction and implication will arise, another author states the result of an examination of the authorities thus:

"A *surrender by operation of law is effected* in cases in which a third person has with the consent of both landlord and tenant taken possession of the demised premises *and been treated by the landlord as his tenant.*"[11]

To the same effect is the language of still another author, as follows:

"Where the tenant abandons the premises and the landlord enters to make repairs, it is such an acceptance as will establish surrender, *and so is an actual or continued change of possession by the mutual consent of the landlord and tenant,* whether the premises are in the possession of the landlord *or a third person.*"[12]

That the rule applies as well in the case of an express covenant, as otherwise, is apparent from the following language from a decision in which the action involved was brought upon an express covenant:

"But when there is an express covenant to pay the rent, the *mere* breaking of the privity of estate will not release the lessee. 'There must be an assent of the landlord with the intent to substitute him' (the assignee) 'in the place of the original lessee.'"

And further:

"It is undoubtedly the law that a party's obligation to pay rent may rest separately in either of two ways, one by privity of contract, and the other by privity of estate. In either case, there may be a surrender—."[13]

In Colton v. Gorham,[14] which was an action to recover rentals upon a covenant, which rentals had accrued after an assignment to which the landlord had refused to consent, and in which a point was made as to the form of the covenant, the Court says:

"We find it unnecessary to pursue this inquiry, for the reason that *whatever be the character of the covenant it was competent for the lessor to waive it by accepting B. as his tenant, and thereby discharging defendants of their obligations to pay rent for the full term.*"

It is apparent, then, that a surrender of a written lease with a covenant to pay rent,

(9) Underhill, Landlord and Tenant, Vol. II, pages 1211-1212, Section 712.
(10) Idem, page 1198, Section 706.
(11) Woodfall, Landlord and Tenant, page 340.
(12) Wood, Landlord and Tenant, Vol. II, pages 1173-1174.
(13) Jones v. Barnes, 45 Mo. App. 590.
(14) 72 Ia. 324, 33 N. W. 76.

and an acceptance thereof by the lessor, may be established by facts and circumstances, in which case it is said to occur by operation of law.

That conversations between the parties are "verbal acts," and admissible in evidence was expressly ruled in Churchill v. Lammers,[15] wherein a surrender of a lease by operation of law was set up in defense, the Court saying:

"The sayings of both Brockett and the defendant in the colloquy which the evidence tends to prove were *verbal acts of theirs and like other acts and circumstances* in evidence, were *properly matters for the consideration of* the jury in determining whether there was a surrender by the defendant and acceptance by plaintiff of the premises, *and on this ground were clearly admissible.*"

That such surrender will result in a release of the original lessee; that it may arise though the re-possession be not by the landlord personally, but by a third person, and hence, may arise by a substitution of tenants; that it may occur whether there is or is not an assignment of the original lease, and whether or not such written instrument is delivered up, either to the lessor or the third person; and that the controlling question in the case of a surrender and an acceptance thereof, or of the acceptance of an assignee or other party as a substitute for the original lessee, all depend upon what appears to have been the intention of the parties, are all abundantly established by the authorities quoted, and many others which might be cited.

And it also appears that this intent may be established by facts or circumstances, which will, of course, differ in every individual case.

As applied to a state of facts somewhat similar in some respects to those of the case under consideration, and as disclosing what is meant in such cases by "intention," the following rule is laid down:

"The forming of a corporation which includes one of a firm who was a tenant, and the taking over of the assets of the firm by the corporation with an acceptance of rent by the landlord from the corporation *may constitute a surrender if the Court is satisfied the landlord accepted the corporation as a tenant.*"[16]

In respect to "intention," or "intent," it must be borne in mind that it is what the law will imply from the *acts* of the parties, not from their statements alone. "Actions speak louder than words," is applicable in law as elsewhere.

In White v. Berry,[17] the Court states the rule in cases of this character, as follows:

"That an actual and continued change of possession of premises let, by the mutual consent of the landlord and tenant, will amount to a surrender of the premises by operation of law, there can be no doubt. Moreover, it is clear that such consent *need not be express* in order to be effectual, but may be implied from circumstances."

And again:

"*Whatever the plaintiff's intentions* might have been regarding the acceptance of said premises *is immaterial, so long as his conduct was such as to amount in law to an acceptance* thereof, as it clearly was."

In this case, the question involved was whether there had been a surrender of certain demised premises, where the tenant gave notice of an intention to quit, the landlord asked him how about his lease, and ultimately said he would see him again; where the tenant did move out; where the landlord re-let the premises for a part of what would have been the term, and where he claimed he had never intended to release the tenant.

In Welcome v. Hess,[18] the Court uses the following language:

"And *while it is said* that a *surrender by operation of law is by acts which imply mutual consent, it is quite evident that such*

(15) 60 Mo. App. 244.

(16) Underhill, Landlord and Tenant, page 1213, citing Golding v. Brennan, 183 Mass. 286, 67 N. E. 239.

(17) 24 R. I. 74, 52 Atl. 682.

(18) 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145.

result is independent of the intention of the parties that their acts shall have that effect. It is by way of estoppel."

This was a case of an oral lease, but we have already seen, in Jones v. Barnes, and especially, Colton v. Gorham, *supra,* that in respect to surrender, it is immaterial whether the covenant be express or implied. It can be waived or released in either case. At most, it creates a difference of degree of evidence.

In a somewhat recent case, involving some of the phases of the one under consideration, the Court holds: "The lease expressly provided that it might be assigned to a corporation thereafter to be organized —but did not provide that such assignment should work a release of the ——— Company (original lessee) as lessee in said lease. We are therefore of the opinion that the ——— Company remained liable for the payment of the rent provided to be paid in the lease from the 'lessor' company to the 'original lessee' company after it was assigned to the 'assignee company'." And this is all the Court says, and it does not in any manner disclose or comment upon the state of the evidence in respect to the taking of the lease or the making of the assignment.[18a]

Another recent case, dealing with a state of facts, however, that are rather widely different from ours, is Kanawha-Gauley Coal Company v. Sharp.[19] In this case defendant obtained from plaintiff a lease of coal lands on royalties. The lease contained an express covenant to pay rent, and also a clause that it was "mutually agreed that the lessee shall not sublet the rights acquired under this lease to third parties without the written authority of the lessor, but the lessee is not hereby prevented from forming a company to work the property under this lease." The defendant organized a corporation and attempted to assign the lease to it, but the plaintiff never consented expressly, though it knew the corporation was formed and was in possession of the property. Plaintiff kept the royalty account in the name of this corporation, and accepted payments of royalties from it. Certain royalties not being paid, plaintiff sued defendant upon the lease, setting up that it had never been lawfully assigned, and upon the covenant, claiming lessee had not been released.

In respect to the first ground, the Court held that the plaintiff had waived the breach of the covenant against assignment, although it also held that: *"Plaintiff did not authorize an assignment of the lease* by defendant to the Raven Coal Company."

Here is a radical difference from our facts, because the latter disclose an express authorization in the lease itself.

In respect to the second ground, the Court held the defendant liable, saying: "If the lessee assigns the lease, either with or without the lessor's assent, the former remains liable on his covenant to pay rent, although rent is accepted from the assignee, *unless the lessor expressly agrees to release the lessee and substitute the new tenant in his stead."* In support of this declaration of the law, the Court cites a number of cases.

It now becomes necessary to examine both the facts and the law of this case, to see what bearing it has as a precedent.

The ultimate facts show an "acquiescence" in an "attempt to assign," which the landlord was held estopped to deny, even in the face of an express covenant not to assign "without written authority," which authority did not appear, and was expressly held by the Court not to exist. They also show a corporation organized and put in possession of the property, and charged with royalties due and credited with those paid.

The opinion sets forth that the defendant "denied liability on the ground that the

(18a) Midland Tel. Co. v. Natl. Tel. News Co., 236 Ill. 476, 86 N. E. 107, 109.
(19) 80 S. E. 781, 52 L. R. A. N. S. 968.

lease, though taken in his name, was in fact obtained for a mining corporation not organized, but then in contemplation by him, and of which plaintiff was fully advised pending negotiations for the lease, and to which arrangement and purpose it gave assent by a stipulation in the lease." This claim of the defendant, however, is not commented upon by the Court, further than to hold, in respect to it, that "Plaintiff did not authorize an assignment of the lease to the corporation." In other words, that the plaintiff did *not* give assent by a stipulation in the lease. The reason for the Court's further silence becomes apparent.

The ultimate question in the case is that of the effect of assent to an assignment—which in this case the plaintiff is not in a position to deny—and an acceptance of rent from the assignee, upon the original lessee's liability upon his express covenant to pay rent.

Upon this, the Court holds, as already noted, that the lessor must "*expressly* agree to release the lessee, and substitute the new tenant in his stead."

In respect to this declaration of the law, two things must be said: First, if the Court means just what it says, that an *express* agreement is required, then this decision is opposed to the authorities already cited, and numerous others, because they all hold that a release may be effected by *operation of law*, as well as by express agreement. Second, the Court cites a number of cases to sustain its position, *but not one of them lays down any such rule*, and two at least of them, Jones v. Barnes,[20] and Frank v. Maguire,[21] in terms hold that the release may be by operation of law.

But in all probability the Court did not intend its statement to be taken literally. What it doubtless meant, and this would bring it in line with the authorities, is that beyond the assignment and acceptance of rent, facts and circumstances must appear which would show that the lessor intended to release the original lessee by substituting the new tenant in his stead. As already seen, this intention may be the implication in law from facts and circumstances as well as an express agreement to that effect.

Taken in this sense, which seems the only one reasonable way in which it can be taken, the case would appear to be by no means conclusive of any question involved in the case under consideration.

There is one case, however, which does appear to have a more direct bearing. In Ascarete v. Pfaff,[22] upon a lease with covenants, *and including an express authorization to assign*, the original lessee was sued for rentals accruing after an assignment. The Court held the original lessee not liable, saying:

"It is true that an insolvent person might be substituted, to whom the landlord would never have leased the premises, but if he is willing to grant the authority of substitution to his tenant, he or those to whom he may assign must bear the consequences."

The Court cites particularly the case of Patten v. Deshon,[23] as stating the rule in this class of cases, as follows:

"If the whole or part of the leased premises be transferred by the original lessee *for the residue of the term*, this is an assignment, and the assignee becomes liable for the whole or a proportionable share of the rent to the original lessor, *at his election*. The first assignee, notwithstanding the assignment, remains liable for the rent, *in virtue of his express covenants*, if the lessor elects so to hold him. But if the original lessor assents to the assignment and *agrees to accept the assignee as his tenant*—and proof of receiving rent from the assignee will be deemed evidence of such assent—he has no longer any right of action against the original lessee."

In the passage taken from Ascarete v. Pfaff, *supra*, it will appear that the Court proceeds along the lines laid down earlier

(20) 45 Mo. App. 590.
(21) 42 Pa. St. 77.
(22) 78 S. W. 974.
(23) 67 Mass. 325.

herein in respect to the method of reasoning upon the presumed intentions and liabilities of the parties in the face of facts and circumstances. The Court in Parton v. Deshon, it should be observed, makes use of the words: "Accept the assignee as his tenant" in the proper sense of which we have previously spoken.

The case, however, which seems to throw the most light upon the questions under consideration is Re Heckman's Est.[24] In this case, a lease was negotiated from a landlord through an agent, and the written instrument was executed and delivered to Heckman. It was fully known at all times to all parties that the lease was wanted solely for a corporation to be organized. The corporation was organized, and Heckman assigned the lease to it at once, and it took possession of and operated the demised premises as a brick plant. Heckman became the president. Bills for rentals were presented to the corporation in its own name and paid by its checks. After his death a claim was filed against the estate of Heckman for rentals due under the lease. The Court held Heckman not liable, and says:

"Under the circumstances disclosed in the evidence, we think the knowledge of Shafto" (lessor's agent) "was notice to his principal *that the tenant of the yard and the purchaser of the clay was the corporation,* and not any member or officer thereof; that the corporation was *the proprietor, operator and owner of the works, and was to be looked to for the rents or royalties.* The *subsequent course of dealing would indicate actual knowledge* of the facts, and recognition of the relation of lessor and lessee between himself and the corporation on the part of Ward" (lessor).

The significant thing about the case is its clear holding that the landlord had knowledge, or at least notice, that "the tenant of the yard—was the corporation—and was to be looked to for the rents and royalties." Such being the case, it would constitute a full and complete surrender, under all the authorities. And when such is established, as the authorities also establish, whether there was or was not an express covenant becomes immaterial.

From all of the authorities, then, it appears that there may be deduced the following principles: That the liability of a lessee-assignor upon his express covenants, after assignment, may be released by anything that amounts to an agreement to that effect; that such agreement may be implied, and may be made to appear from facts and circumstances, as well as by express terms, in which former event, it is said to arise by operation of law; that the facts and circumstances, which will necessarily differ in every case, are sufficient to give rise to an inference of such an agreement when their fair and reasonable interpretation, in view of all the conditions, makes it appear that such was the intention of the parties; that this intention "in law" may arise and be made out, irrespective of the claims of the parties as to what they intended at the time; that continued possession by the assignee with the assent of both lessor and original lessee and exclusive dealings in respect to the property with such assignee, dealings at any time which tend to disclose the intent of the parties in respect to the lease and the possession thereunder, and authorization in the lease itself to make an assignment, all are matters concerning which evidence is admissible, and which, if established, may give rise to a conclusive presumption of a substitution, surrender and consequent release of the original lessee upon his express covenant. And if conclusions hereinbefore referred to, which were arrived at by an examination into the origin and history of the theory and rule of the original lessee's liability, are given application and effect, this presumption will still more readily arise. And further than this, it also appears that the assignee may even be found to have been and

(24) 33 Atl. 552.

to be the real party in interest, the real tenant at all times.

If these principles are applied to the case under consideration, it would seem to appear that the original lessee could not be liable. With the knowledge of all parties, a corporation to be organized, and which is indeed duly organized once the lease is obtained, is at all times looked forward to as the only tenant, and becomes such. To put it another way, the contemplated corporation is at all times the real party in interest, though prior to its organization, it has no capacity to take, hold or become formally interested in a lease. The lease itself contains an express authorization to assign, and more than that, this authorization is in such terms that it amounts to an express selection of a tenant, the language being: To a corporation *of which* he is a member. All dealings thereafter are with it exclusively, and the original lessee is no longer considered, until upon a failure of the corporation to make payment of rentals, the lessor makes demand upon the original lessee, claiming he has never been released. But this assertion would appear to come too late. The whole situation would seem obviously to negative it. And in any event the actual intention is immaterial, where acts and conduct have made the contrary to appear. The facts and circumstances would all appear to give rise to the inference, as the only fair and reasonable one, that the original lessee was looked upon merely as a means, a conduit through which the right to the possession of the lease and the premises could pass to the corporation to be organized, which was to be, and did actually become, the sole tenant and party in interest, and was so treated. This would seem to result in establishing the corporation as the real and only tenant, upon the authority of Heckman's Estate, *supra*. Or, in any event, that it would establish a substitution of an actual tenant for one who on the face of the instrument, was, prior to the assignment, formally entitled to possession as tenant, though as a matter of fact, never intended or expected to become such. And this substitution would as certainly result in a surrender and acceptance, and the consequent release of the original lessee from any liability whatever.

H. W. DANFORTH.

Denver, Colo.

CARRIERS OF GOODS—NON-DELIVERY TO CONSIGNEE.

L. KOMMEL & SON v. CHAMPLAIN TRANSP. CO.

Supreme Court of Vermont. Nov. 19, 1918.

105 Atl. 253.

Where a storekeeper sold his business to an employe, who had been in the habit of receiving and giving receipt for goods at a carrier's warehouse in the storekeeper's name, the carrier was liable to a consignor for goods delivered to the employe, where ordered, subsequent to the sale, by the employe in the name of the former storekeeper, to whom they were consigned; carrier and consignor both being ignorant of sale of business.

MILES, J. This is an action against the defendant for failure to deliver goods consigned by the plaintiff to B. J. Fayette. The case was tried by the municipal court of the city of Burlington, Vt., and from the facts found by that court it appears that the plaintiff, on April 26, 1912, shipped from New York, via the Hudson Navigation Company, two cases of dry goods, consigned to B. J. Fayette, 77 North street, Burlington, Vt., which in due course of transportation were received by the defendant and transported to its dock in Burlington, for delivery to the consignee. While doing business at 77 North street, Fayette conducted a mercantile business, having a telephone in his store for general use, and employing several assistants in his business, among whom was M. J. Solomon, a brother-in-law of Fayette. During the time he was in trade, all freight consigned to him, coming over the defendant's transportation line, was taken from defendant's dock warehouse and hauled by Fayette's own teams, and by Fayette's direction notice was to be given to him by telephone, when freight

was received at such dock warehouse, and Fayette would send his teams and remove such freight. Fayette sometimes went after the goods himself, and at other times he would send some of his employes. Fayette's instructions to the defendant were to deliver such freight to any one of his employes who came for it, and allow them to receipt for it. Acting under these instructions, M. J. Solomon, upon several occasions, called for and receipted for goods consigned to Fayette. On August 1, 1911, Fayette sold his business on 77 North street, Burlington, Vt., to Solomon, and went into the fruit business on another street in Burlington, allowing his telephone to remain in the North street store in his name and number, until after the delivery of the goods in controversy.

In April, 1912, the plaintiff's traveling salesman called at the North street store supposing that Fayette was still in business there, and took an order for the cases of goods in question from Solomon, supposing he was selling the goods to Fayette. Solomon had previously ordered goods for Fayette from the plaintiff, which had been received and paid for by Fayette. At the time of the order, plaintiff's salesman made no inquiry as to who was purchasing the goods, and Solomon did not disclose that he was the owner of the store at that time. The goods purchased on this order were shipped by boat from New York and consigned to Fayette at 77 North street, Burlington, Vt. In due time the goods were received by defendant, and unloaded from their steamboat upon their wharf in Burlington, and defendant's freight agent at once called Fayette by telephone at 77 North street, Burlington, and directed that he be notified of the arrival of the goods, and to send for and take them away. Solomon at once went with a team for the goods, and received and receipted for them in the name of Fayette, "by M. J. Solomon." Fayette had nothing to do with the store on North street, or with its management, after he sold to Solomon, nor did Solomon continue in the service of Fayette after that date. The fact of the sale was unknown to either the plaintiff or defendant until after the delivery of the goods to Solomon.

After the delivery of the goods, the plaintiff presented to Solomon a bill for them, who paid thereon $15 in cash and a check for $40, signed by Fayette, and made payable to and indorsed by himself, and no further payments have been made on the bill, and this suit is brought to recover the balance due on the bill.

The municipal court found that the defendant was in possession of the goods at the time of the delivery as warehouseman, and that as such it was in the exercise of ordinary care, prudence and precaution when delivering the goods to Solomon. To this last finding the plaintiff excepts, on the grounds that there was no evidence supporting that finding.

The bill of lading in this case required the goods to be delivered to the consignee, B. J. Fayette, named in the bill of lading; and though Fayette had no knowledge of that fact, nor interest in the goods shipped, that fact in no way justified the defendant in delivering them to one not entitled to receive them. Without authority of the plaintiff the defendant was not justified in delivering the goods to any one but the consignee or to his order and it was the duty of the defendant to hold the goods until called for by the consignee or the plaintiff, and a delivery to one not entitled to receive them, though induced to make such delivery through the fraud of a third party, will not excuse the carrier. Winslow et al. v. Vt. & Mass. Railroad, 42 Vt. 700, 1 Am. Rep. 365; Express Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107; Express Co. v. Shearer, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, Am. St. Rep. 324; Price v. Oswego & Syracuse R. R. Co., 50 N. Y. 213, 10 Am. Rep. 475. The facts of this case are so similar to those in Winslow et al. v. Vermont & Mass. Railroad Co., supra, that to sustain the judgment in this case would overrule that case, besides being in conflict with the great weight of authority outside of this state. This rule may seem harsh in some cases; but experience has firmly established the fact that in a great majority of cases this strict requirement imposed upon the common carrier is for the public good.

The defendant urges upon its former course of delivery of goods shipped to Fayette. To be sure, it enabled Solomon to perpetrate a fraud upon the defendant; but the plaintiff was not in any way responsible for that, and, so far as the case shows, was ignorant of it. The defendant also urges that, because Solomon ordered the goods in the name of Fayette, in the absence of negligence or knowledge of fraud, the common carrier would not be liable,

and cites Wilson v. Adams Express Co., 27 Mo. App. 360, and Dunbar v. Boston & P. R. Co., 110 Mass. 26, 14 Am. Rep. 576, in support of its claims.

These cases, when rightly considered, are not in conflict with the rule laid down in Winslow v. Vermont & Mass. R. R. Co., supra, also cited by the defendant in this connection; besides, if they were, we should adhere to our own decisions, which we think are in line with the weight of authority in this country and in England.

Judgment reversed, and judgment for the plaintiff, and cause remanded for the assessment of damages.

NOTE.—*Consignee Contributing to Misdelivery of Goods.*—The instant case proceeds on the theory that the obligation of the carrier to deliver goods to consignee in a bill of lading is absolute in its nature, when it seems to me that, if the consignee might be held responsible to a shipper notwithstanding the goods were never in fact delivered to him, then the carrier should be excused for the non-delivery. In such a case the failure to deliver is rather to be classed as non-delivery than misdelivery.

Winslow v. Vt. & Mass. R. Co., 42 Vt. 700, 1 Am. Rep. 365, by no means resembles the instant case in its facts. There the shipper, being induced by the representations of one Collins, shipped goods to a fictitious purchaser on credit, and they were lost to the seller by a person appearing and representing himself to be the consignee, when there was no person who was known or passed by the name assumed. The carrier, therefore, made delivery to one who failed to prove his identity. It was said that the shipper's error in directing the goods to a fictitious address "might be an important fact if it misled the carrier and occasioned it to deliver to the wrong party after it had used that care and precaution which would be reasonable in such matters. * * * It delivered the goods to an employee of a truckman upon his mere statement that Roberts sent for them. Any other man in Boston could have obtained them just as easily. The swindler Collins was not known as Roberts, and if he had been required to identify himself as Roberts, might never have attempted it, and if he had, it would have been likely to lead to the detection of the fraud." But this seemed to have been an entirely isolated transaction. It had not grown out of a condition raised up by antecedent circumstances. And the same may be said as to Express Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107, but even in that case it is said that: "A modification of the rule as to personal delivery is sometimes sustained upon the ground of custom or usage, but nothing of that kind enters into this case." But the facts in the instant case do show that there was a usage recognized by the consignee to deliver goods for him to the party who received them.

Pacific Express Co. v. Shearer, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, was much like the Van Meter case, and the reasoning in that case shows it may be a question of fact whether the non-delivery to the real consignee was excusable or not.

In none of these cases do we find where there was any question of estoppel against the consignee, but it has been held that a consignee may estop himself, Phila. & R. Co. v. O'Donnell, 12 Pa. 213. And a consignor may also, Stimson v. Jockson, 58 N. H. 138; Lake Shore & M. S. R. Co. v. Hodapp, 83 Pa. 22.

And it is so that delivery to an agent of the consignee is such a delivery as satisfies, So. Exp. Co. v. Everett, 37 Ga. 688. If there is delivery to an alleged agent it must be shown that he is or is held out to be a real agent. Nebenzahl v. Fargo, 15 Daly 130. Did the carrier in the instant case have to do more than show that the real owner held his former employee out as his agent or he left matters in the shape where it could be inferred, as against his former employer, that the relation still continued?

It has been held that, if a carrier receives goods billed to a consignee, it cannot be held for non-delivery where it is itself the owner, Valentine v. R. Co., 187 N. Y. 121, 79 N. E. 849. Now cannot it defend as against a consignee where it delivered to one who was apparently his agent? If so, why may it not defend against the consignor and thus pass action for recovery of the value of the goods over to consignor to sue consignee therefor?

It has been held, also, that the burden is on the carrier to show that consignee is not the true owner, when it delivers to another. Graham v. N. P. Exp. Co., 89 Minn. 193, 94 N. W. 548; Atl. & B. R. Co. v. Howard Supply Co., 125 Ga. 478, 54 S. E. 530. This same rule would put on the carrier the burden of showing that delivery was made to one whom it had the right to regard as the agent of the consignee, whom also the consignor might sue consignee for goods delivered to his agent. Consignee may be estopped to deny that the party receiving the goods was his agent. At least the proof shows in the instant case that the seller was misled by an appearance of things which it was in the power of the consignee to have prevented. The seller drew his own conclusions as to the party being the consignee's agent, and it was from the seller's conclusion that the error on the carrier's part came about. Suppose consignee had brought this suit, could it not be shown that by his fault there had been no delivery?

It seems to us that in the instant case, there were questions of fact (1) whether seller's trusting to appearances was not the proximate cause of loss, and (2) whether appearances to carrier were such as justified the conclusion that the former employee of the consignee was not permitted by the latter to continue to so appear and thus make the delivery in effect to the consignee. I find, however, no case precisely on all fours with the instant case. C.

CORRESPONDENCE.

SERVICE ON AGENT OF DIRECTOR GENERAL OF RAILROADS WHO IS NOT THE AGENT OF THE RAILROAD SUED.

Editor Central Law Journal:

As a proposition for your query department, apropos the government operation of railroads:

Can a party who is injured outside the state of his residence maintain an action at his place of residence and upon service had upon some local railroad agent who is under control of the Director General of Railroads but who is not and was not at any time an agent of the company owning the line on which the injury occurred, said line not operating in the jurisdiction in which the action is sought to be maintained? The Director General of Railroads, and not the company owning the line, is liable.

This question is likely to be very important, especially if government control continues.

Very truly yours,

WICKENS, OSBORN & HAMILTON.

Greensburg, Ind.

We forwarded this query to Mr. Henry C. Clark, Jacksonville, Fla., author of article on General Order No. 50, and received the following reply:

Editor Central Law Journal:

Your letter of the 12th inst., inclosing query from Messrs. Wickens, Osborn & Hamilton, at hand. This query would seem to be answered by the article on General Order No. 50, published in the Journal of Feruary 7, which article sets out in full General Orders Nos. 18, 18a and 50.

Specifically answering the query, however, I would say:

"Under General Orders Nos. 18 and 18a, issued by the United States Railroad Administration, a plaintiff is granted a right to sue at the place where he resided when injured, though until General Order No. 50 was issued, a means of perfecting service directly upon the Director General had not been specifically authorized. Wherever suit should be brought since the issuance of General Order No. 50, the defendant would be the same party. The United States Railroad Administration is one tremendous organization, and not a number of comparatively small organizations corresponding to the former separate railroad systems which are now consolidated into the United States Railroad Administration. Therefore it would seem that a suit could be successfully prosecuted, so far as venue and service are concerned, at the place of residence of the party injured, provided he resided at this same place when injured."

You will be interested to learn that I have received several commendatory letters regarding the article upon General Order No. 50.

Very truly yours,

HENRY C. CLARK.

Jacksonville, Fla.

HUMOR OF THE LAW.

Judge—Madam, have you anything to say?

Prisoner's Husband—Lord, Judge! Now you've done it!—Life.

Seth Low, former president of Columbia University, tells an amusing story of an experience while motoring through New England last summer. His car was held up at an old-fashioned toll-gate, and while he was waiting for change two elderly spinsters came along in a buggy.

"How much is the toll?" demanded one of the old ladies, glowering at the toll-gate keeper.

"Twenty-five cents for a man and a horse," said the latter.

"Get out of the way then; we're two women and a mare," shrilled one of the women. "Get up, Gladys," and giving the reins a vicious switch, the pair disappeared in a cloud of dust.

Senator Lodge, while visiting in a rural district dropped in on a boyhood friend, now a justice of the peace. While chatting over old times a couple came in to get married. The justice married the pair and after accepting a moderate fee, handed the bride an umbrella.

Lodge observed the proceeding in solemn silence, but after the couple had gone he asked:

"Do you always do that, Arthur?"

"Marry them? Oh, yes, if they have the license."

"No. I mean give the bride a present?"

"A present? Why, wasn't that her umbrella?"

"No," said Lodge, peevishly, "it was mine."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Bailment**—Common Law Lien.—A repairman who repairs an automobile has a common-law lien thereon until charges for labor and expenses are paid.—Winton Co. v. Meister, Md., 105 Atl. 301.

2.——Gratuitous Bailee.—A gratuitous bailee is answerable only for gross negligence.—Altman v. Aronson, Mass., 121 N. E. 505.

3. **Bankruptcy**—Assignment of Wages.—If valid in its inception, assignment of wages remained in force, notwithstanding assignor's discharge in bankruptcy, until it was determined by statutory limitation of time (St. 1909, c. 514, as amended by St. 1916, c. 208), by act of the parties, or by operation of law.—Raulines v. Levi, Mass., 121 N. E. 500.

4.——Installment Contract.—Where installment contracts, under which seller continued to collect installments, were legally pledged to secure a loan, the pledgee, on the pledgor's bankruptcy, was entitled to lien on collections in hands of trustee, though no notice of assignment had been given to debtors until shortly before bankruptcy and until after the pledgee had knowledge of the insolvency.—Barker Piano Co. v. Commercial Security Co., Conn., 105 Atl. 328.

5.——Insurance.—An order directing the bankrupt to pay or secure to the trustee the cash surrender value of insurance policies providing for change of beneficiary held not a summary order against the beneficiary named; the order not purporting to affect her rights.—Richter v. Rockhold, U. S. C. C. A., 253 Fed. 941.

6.——Preference.—Though "reasonable cause to believe" is different in meaning from "reasonable cause to suspect," trustee in bankruptcy, suing to set aside conveyance as preference, was not required to show absolute knowledge by creditor bank and its vice-president, who took conveyance for it, that transaction would effect preference, but only reasonable cause of belief.—Underwood v. Winslow, Mass., 121 N. E. 524.

7. **Banks and Banking**—Imputability.—Where a contracting bank is represented only by its cashier, and its president represents the other contracting party, knowledge of facts known to president, but not to cashier, is not imputable to bank.—Kipp v. Welsh, Minn., 170 N. W. 222.

8. **Bills and Notes**—Certificate of Deposit.—A certificate of deposit is not non-negotiable, for lacking the certainty required of commercial paper, although on its face it appears that it is subject to the rules of the savings department of the issuing bank.—White v. Wadhams, Mich., 170 N. W. 60.

9.——Failure of Consideration.—There can be no recovery on a note the consideration for which has failed.—Odlin v. Stuckey, Fla., 80 So. 291.

10.——Verbal Acceptance.—Acceptance of a draft may be verbal, and need not be in writing.—Farmers' Guaranty State Bank of Jacksonville v. Burrus Mill & Elevator Co., Tex., 207 S. W. 400.

11. **Cancellation of Instruments**—Equity.—Equity has jurisdiction of an action by heirs of the assignor to cancel an assignment of a receipt for bonds.—Lipson v. Evans, Md., 105 Atl. 312.

12. **Carriers of Goods**—Conversion.—Where freight in railroad's possession for shipment is claimed by different parties, it must be delivered to true owner entitled thereto, and delivery to him is a complete defense to an action of conversion.—Jones V. Chicago, B. & Q. R. Co., Neb., 170 N. W. 170.

13. **Carriers of Passengers**—Alighting.—Carrier held not generally to assist a passenger to alight from a train, except in case of a sick, aged, or infirm passenger, as to whom it must furnish such assistance where its employes by ordinary care see that assistance is needed.—Dickinson v. Tucker, 176 Pac. 949.

14.——Common Carrier.—One riding on a train running over a railroad under right given the train owner by contract with the railway company, stipulating that the company was not acting therein as a common carrier, was not a passenger of the company; but his claim for injury from its negligence rests on the general right of an individual not to be injured by another's negligence.—Chicago, R. I. & P. Ry. Co. v. Maucher, U. S. S. C., 39 S. Ct. 108.

15. **Chattel Mortgages**—Purchase by Mortgagee.—Consent to mortgagee purchasing at his own sale under chattel mortgage not being given by mortgage or otherwise, the equity of redemption is not extinguished by such sale and purchase, so mortgagor's lessees, occupying the status of second mortgagees, are entitled to the property subject to mortgagee's lien, and for their refusal to allow him to take

the property he can recover only the debt and interest.—P. R. Sinclair Coal Co. v. Missouri-Hydraulic Mining Co., Mo., 207 S. W. 266.

16.——Security.—A conveyance of personal property which shows on its face that it is security for a debt constitutes a mortgage.—Noland v. Osborne, N. C., 97 S. E. 714.

17. **Commerce** — Carmack Amendment.—The Carmack Amendment deals only with shipments of property, and not with transportation of persons.—Chicago, R. I. & P. Ry. Co. v. Mauch-er, U. S. S. C., 39 S. Ct. 108.

18.——Employe.—Proof that railroad employe was injured while repairing a locomotive used in interstate commerce and taken from line tracks and placed in roundhouse was insufficient to show that rights of parties were controlled by federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665).—Chicago, R. I. & P. Ry. Co. v. Cronin, Okla., 176 Pac. 919.

19.——Food and Drug Act.—The Food and Drugs Act does not affect the question when interstate commerce in an article of food satisfying that act ceases, and the article becomes subject to the laws of the state, into which it is brought, prohibiting its sale.—Weigle v. Curtice Bros. Co., U. S. S. C., 39 S. Ct. 124.

20.——Indirect Effect.—Indirect effect on interstate commerce of Gen. Code Ohio, § 12725, penalizing sale of condensed milk, unless made from full cream milk, does not invalidate the act.—Hebe Co. v. Shaw, U. S. S. C., 39 S. Ct. 125.

21.——Safety Appliance Act.—Even though compensation for injuries to persons engaged in intrastate commerce be of no concern to Congress, the liability of interstate carriers to pay such compensation because of their disregard of federal Safety Appliance Act, is within control of Congress and within contitutional grant of legislative authority as to interstate commerce.—Bergeron v. Texas and P. Ry. Co., La., 80 So. 262.

22. **Contracts**—Attorney and Client.—Attorney's contract to advise his individual client, in a matter pending before state Corporation Commission relating to the building of a new depot, under which a certain sum was payable when the commission's order for depot at certain location should have become final, was not void as against public policy.—Campbell v. House, Okla., 176 Pac. 913.

23.——Executory Agreement.—An unsigned contract cannot be enforced by either of the parties, however completely it may express their mutual agreement, if it was also agreed that the contract should not be binding until signed by both.—Hardwood Package Co. v. Courtney Co., U. S. C. C. A., 253 Fed. 929.

24.——Place of Contract.—The validity and obligation of a contract relating to personal property are governed by the law of the place where it is made, in the absence of a contrary intent.—Liebing v. Mutual Life Ins. Co. of New York, Mo., 207 S. W. 230.

25.——Refusal to Perform.—Where one party to an executory contract deliberately declares that he will not perform, the other party may at his option treat the contract as terminated. Ambler v. Sinaiko, Wis., 170 N. W. 270.

26. **Corporations** — Directors. — Although directors of corporations are not expected to attend to current business, they must at their peril give such attention to and so manage the affairs of the company that they may be able at all times to know what their executive officers, agents, and fellow directors are doing, and they are liable to the corporation or its legal representative for losses occasioned by a breach of such duty.—Besselieu v. Brown, N. C., 97 S. E. 743.

27.——Executory Contract.—Under an executory contract to sell stock, binding on both purchaser and seller, wherein nothing is said about the dividends, dividends declared while the contract is executory belong to the purchaser, and not to the seller.—Bank of Waverly v. Daily, Neb., 170 N. W. 183.

28.——Forbearance to Sue.—Forbearance to sue upon and cancellation of original agreements to repurchase shares of stock was sufficient to support new agreements, wherein defendant was given extension of time.—Grassmuck v. Ehrler, Mo., 207 S. W. 287.

29.——Foreign Corporation.—That a foreign corporation in a single instance acts as a trustee under a deed of trust for the holders of mortgage bonds, collects interest, takes title to property as security, and otherwise discharges the duty of a trustee, does not constitute "carrying on business" in the state within Civ. Code, § 408.—Equitable Trust Co. of New York v. Western Land & Power Co., Cal., 176 Pac. 876.

30.——Foreign Corporation.—There is no presumption that a foreign corporation is doing business in the state in violation of the statutes thereof.—Campbell Electric Co. v. Christian, Minn., 170 N. W. 199.

31.——Internal Management.—Suit against a foreign corporation by purchaser of its stock to enforce a transfer thereof on books does not involve internal management of or visitorial power over corporation, but simply the individual rights of purchaser cognizable by the court. —Citizens' Nat. Bank of Port Allegany, Pa., v. Consolidated Glass Co., W. Va., 97 S. E. 689.

32.——Notice to Agent.—A corporation is not chargeable with knowledge of facts which become known to its agent, unless the agent in the line of his duty ought and could reasonably be expected to communicate the knowledge to his principal.—Elgin, J. & E. Ry. Co. v. United States, U. S. C. C. A., 253 Fed. 907.

33.——Tort.—Corporations may be held liable both for the willful and negligent torts of their agents, including slander, when the defamatory words are uttered by express authority of the company, or within the course and scope of the agent's employment.—Cotton v. Fisheries Products Co., N. C., 97 S. E. 712.

34.——Ultra Vires.—Except in cases where the rights of the public are involved, the plea of ultra vires, whether interposed for or against a corporation, will not be allowed to prevail when it will not advance justice, but will accomplish a legal wrong.—Hollis Cotton Oil, Light & Ice Co. v. Marrs & Lake, Tex., 207 S. W. 367.

35. **Covenants**—Eviction.—Covenants of warranty of title run with the land, and ordinarily a right of action does not arise in favor of the grantee or subsequent holder of the title until there has been an eviction under title paramount.—Quinn v. Lee Wilson & Co., Ark., 207 S. W. 211.

36. **Criminal Law** — Co-Conspirator.—In a prosecution for conspiracy to use the mails in furtherance of a scheme to defraud, where a conspiracy between defendants to carry out such scheme is shown, evidence of acts of one defendant in its execution is admissible against the others.—Hallowell v. United States, U. S. C. C. A., 253 Fed. 865.

37.——Consolidating Indictments.—The trial court may, in its discretion, consolidate several indictments before trial, and try the same together.—Le More v. United States, U. S. C. C. A., 253 Fed. 887.

38.——Preliminary Hearing.—While the right to a preliminary hearing is universally recognized in this country, such right is not a constitutional right, but is granted by statutes only.—State v. Ross, N. D., 170 N. W. 121.

39. **Damages**—Interest.—In action for injury to property, it was improper to instruct that interest must be added by jury to amount awarded by them as damages.—Ryan v. Empire Engineering Corporation, N. Y., 121 N. E. 461, 225 N. Y. 62.

40. **Equity** — Statute of Limitations.—The statute of limitations in general applies equally in equity as at law.—International Paper Co. v. Commonwealth, Mass., 121 N. E. 510.

41. **Estoppel**—Waiver.—"Waiver" is the voluntary surrender of a known right, while "estoppel" is the refusal to permit the assertion of a right because of the mischief that has been done, and may arise where there is no intention to mislead.—Danville Lumber & Mfg. Co. v. Gallivan Bldg. Co., N. C., 97 S. E. 718.

42. **Executors and Administrators**—Executor de Son Tort.—The executor or administrator of an executor de son tort can be called to account in equity as executor or administrator of his decedent.—Safe Deposit & Trust Co. of Baltimore v. Coyle, Md., 105 Atl. 308.

43. **False Imprisonment**—Unreasonable Delay.—Unreasonable delay in making arraignment amounts to false imprisonment.—Oxford v. Berry, Mich., 170 N. W. 83.

44. **Fixtures** — Trade Fixtures.—"Trade fixtures" are those which a tenant places on property to promote the purpose of his occupation and which he may remove during the term.—In re West, U. S. D. C., 253 Fed. 963.

45. **Fraudulent Conveyances**—Husband and Wife.—A husband may prefer his wife to another creditor in the payment of a debt which he owes her, provided the transaction is free from fraud, and no more property is conveyed than is reasonably necessary at its fair market value to settle the debt.—Diltz v. Dodson, Tex., 207 S. W. 356.

46. **Gifts**—Delivery.—It is an essential element of a gift causa mortis that the delivery must be made in expectation of death.—Funnell v. Conrad, Okla., 176 Pac. 904.

47. **Highway**—Governmental Power.—The power to construct and maintain public highways is a governmental function.—Wright v. House, Ind., 121 N. E. 433.

48. **Homicide**—Deadly Weapon.—A killing with a deadly weapon, admitted or proved, implies malice, and, nothing else appearing, defendant is guilty of murder in the second degree, and the burden is upon him to show mitigation or excuse.—State v. Keever, N. C., 97 S. E. 727.

49. **Injunction** — Irreparable Injury.—"Irreparable injury," within Code Prac. art. 307, providing that if act prohibited by injunction is not such as may cause irreparable injury, judge may dissolve writ on bond, is one for which party injured cannot be compensated adequately in damages.—City of Lake Charles v. Lake Charles Ry., Light & Waterworks, La., 80 So. 260.

50. **Insurance**—Divisible Contract.—Fire insurance policy covering different classes of property, separately valued, containing a condition or warranty relating only to one class, and not affecting risk on the other, is a divisible contract.—Bond v. National Fire Ins. Co. of Hartford, Conn., W. Va., 97 S. E. 692.

51.——Incontestability.—A provision in life policy that the contract "shall be incontestable after one year from date of its issue except for nonpayment of premiums" includes fraud of insured in obtaining the insurance, so that after one year insurer cannot plead such fraud as a defense to action on policy or cross-action to cancel and rescind it.—Metropolitan Life Ins. Co. v. Peeler, Okla., 176 Pac. 939.

52.——Wagering Contract.—Parties to insurance contract may define loss to be covered, provided contract is made in good faith, and not merely to cover wager.—Empire Development Co. v. Title Guarantee & Trust Co., N. Y., 121 N. E. 468, 225 N. Y. 53.

53. **Intoxicating Liquors**—Inherent Rights.—There is no inherent right in a citizen of the United States to manufacture or sell intoxicating liquors or to engage in the liquor traffic as the purchasing agent of another.—State v. Ross, N. D., 170 N. W. 121.

54.——Personal Use.—The "Bone Dry Law," in view of Rev. Laws 1910, § 3605, does not prohibit the bringing into the state of intoxicating liquors lawfully purchased and intended for personal use.—Crossland v. State, Okla., 176 Pac. 944.

55. **Judgment**—Term of Court.—A judgment rendered by a court of competent jurisdiction and regular on its face cannot be set aside after the adjournment of the term at which it was rendered.—Drinkard v. Jenkins, Tex., 207 S. W. 353.

56.——Joint Tortfeasors.—Where two joint carriers are both sued as defendants, it does not follow that judgment acquitting one of them deprives the other of an action against the one acquitted.—Central Nat. Bank v. Pryor, Mo., 207 S. W. 298.

57. **Libel and Slander**—Moral Turpitude.—Slanderous words will be regarded as actionable per se when they impute to another the commission of a crime that involves moral turpitude.—Cotton v. Fisheries Products Co., N. C., 97 S. E. 712.

58.——Special Damage.—An action for libel may be maintained by injured corporation without proof of special damage, where an individual may recover.—First Nat. Bank v. Winters, N. Y., 121 N. E. 459.

59. **Limitation of Actions**—Accrual of Action.—The statute of limitations against a right of action for breach of contract begins to run from the time of the breach.—Boston Towboat Co. v. Medford Nat. Bank, Mass., 121 N. E. 491.

60. **Malicious Prosecution**—Insanity.—A complaint for malicious prosecution of proceeding in which plaintiff was charged with being an insane person was insufficient, where it did not allege that the proceeding to determine plaintiff's sanity had terminated.—Evans v. Wixom, Cal., 176 Pac. 873.

61. **Master and Servant**—Inexperienced Servant.—A master having actual knowledge that a servant is inexperienced in work for which he is employed must use reasonable care in cautioning and instructing servant as to dangers of work and how best to discharge his duties.—Silurian Oil Co. v. Morrell, Okla., 176 Pac. 964.

62.——Res Ipsa Loquitur.—The doctrine of res ipsa loquitur applies in an action by a servant for injuries occasioned by the falling of a hoist or bucket in which he was descending into a mine, where the servant had no control, management, or opportunity to know and be informed concerning the hoist.—Daugherty v. Neosho Granby Mining Co., Mo., 207 S. W. 253.

63.——Sunstroke.—Where sunstroke paralyzed a definite portion of employe's brain, so that it no longer discharged its proper functions, and death shortly resulted in accordance with the ordinary process of such a disturbance of the brain, employe sustained a "personal injury" within Workmen's Compensation Act.—Ahern v. Spier, Conn., 105 Atl. 340.

64. **Mechanics' Lien**—Materialmen.—Laborers and materialmen may recover on a contractor's bond, when there is an express provision to that effect, or when it appears by fair and reasonable intendment that their rights and interests were contemplated and provided for.—Guilford Lumber Mfg. Co. v. Johnson, N. C., 97 S. E. 732.

65. **Monopolies**—Restraint of Trade.—"Restraint of trade" within Sherman Anti-Trust Act (U. S. Comp. St. § 8820 et seq.) has its common-law meaning, and embraces acts, contracts, agreements, or combinations prejudicial to public interests by unduly restricting competition or unduly obstructing due course of trade.—Pulpwood Co. v. Green Bay Paper & Fiber Co., Wis., 170 N. W. 230.

66. **Mortgages**—Inadequacy of Price.—Inadequacy of price for which mortgaged premises were sold on foreclosure cannot vitiate sale otherwise fair and legal.—Carlisle v. Dunlap, Mich., 169 N. W. 936.

67.——Void Sale.—A sale of land without notice by a trustee under trust deed is void, and the deed can be set aside as a cloud upon the title of the owner.—Willie v. Hays, Tex., 207 S. W. 427.

68.——Waste.—Mortgagor's failure to pay interest accrued on a prior mortgage is a species of waste.—Justus v. Fagerstrom, Minn., 170 N. W. 201.

69. **Municipal Corporations** — Governmental Power.—In procuring water supply and extending water supply system and in providing water for fire protection and sanitation purposes, a city is to be regarded as a governmental agency, with power to assess therefor.—Felmet v. Town of Canton, N. C., 97 S. E. 728.

70.——Presumption of Negligence.—Drivers upon highways are not insurers against accidents arising from negligence of children or their parents, and the mere happening of such an accident does not establish liability or raise a presumption that the driver was negligent. —Gardiner v. Studebaker Corp., Mich., 169 N. W. 828.

71. **Negligence** — Invitee.—Department store customer visiting store to examine and purchase merchandise has the right to rely upon the safety of passageways used by customers. —Wine v. Newcomb, Endicott & Co., Mich., 169 N. W. 832.

72.——Penal Ordinance.—Though penal ordinances or statutes cannot be made the foundation of a civil action, they may be used as tending, in conjunction with other evidence, to establish negligence.—New Jersey Fidelity & Plate Glass Ins. Co. v. Lehigh Valley R. Co., N. J., 105 Atl. 206.

73.——Place of Accident.—In action brought in Indiana for personal injuries sustained in Ohio, the law of Indiana is controlling on matters of procedure, while the law of Ohio governs as to whether there is a substantive cause of action.—Cleveland, C., C. & St. L. Ry. Co. v. Wolf, Ind., 121 N. E. 438.

74.——Proximate Cause.—It is only when causes are independent of each other that the nearest becomes the causa proxima.—Tatum v. Louisville & N. R. Co., U. S. C. C. A., 253 Fed. 898.

75.——Proximate Cause.—The wrongful act or omission relied upon as constituting "proximate cause" of injury must be such as that therefrom the injury or some similar injury might be reasonably contemplated.—Haney v. Texas & Pacific Coal Co., Tex., 207 S. W. 375.

76.——Safe Place.—Owner of foundry was bound to exercise reasonable care to keep premises safe for use, according to his invitation, by an inventor having work done there.—Blood v. Ansley, Mass., 121 N. E. 488.

77. **Parties**—Real Party.—Every action must be prosecuted in the name of the real party in interest.—Maxia v. Oklahoma Portland Cement Co., Okla., 176 Pac. 907.

78. **Partnership** — Relationship.—A "copartnership" is the relation that exists between two or more persons who have combined their property, labor, and skill in an enterprise or business as principals for the purpose of joint profit.—Rotzien v. Merchants' Loan & Trust Co., S. D., 170 N. W. 128.

79. **Principal and Agent**—Notice to Agent.—Notice to an agent will be imputed to the principal only where the agent acquires his knowledge in the transaction of his principal's business.—Alexander v. Anderson, Tex., 207 S. W. 205.

80.—Power of Attorney.—Powers of attorney are construed strictly, and no special authority is implied by general terms of a procuration except ordinary powers of administration, and none is implied from special authority except what is plainly contemplated as necessary for exercise of authority expressly granted, in view of Civ. Code, arts. 2994-2996.—Bolton v. Rouss, La., 80 So. 226.

81. **Railroads**—Inspection.—Where a carrier tenders cars to the shipper, the duty is upon it, and not upon the shipper, to inspect such cars, though furnished as empties by a connecting carrier.—Mississippi Cent. R. Co. v. Lott, Miss., 80 So. 277.

82. **Sales**—Caveat Emptor.—The rule of caveat emptor does not apply where the seller is guilty of the fraudulent concealment of a latent defect affecting the value of the property for the purpose for which is it bought.—Humphrey v. Baker, Okla., 176 Pac. 896.

83.——Delivery to Carrier.—Delivery to the carrier is delivery to the purchaser of merchandise, in absence of an agreement to the contrary.—Kemper-Thomas Co. v. Deitz, Mich., 169 N. W. 826.

84.——Implied Warranty.—Where flour was sold by retail dealer to consumer for immediate use, there was implied warranty flour was fit for food, and, when it contained arsenic, which, when served in bread by his wife, poisoned the purchaser, the dealer was liable to his estate as for breach of warranty.—Heinemann v. Barfield, Ark., 207 S. W. 62.

85.——Warranty.—On issue of breach of warranty for fitness for a particular purpose, it is necessary to prove the value of the unfit property and its value if as warranted and loss incurred in bona fide attempt to use it for purpose warranted, and without such proof the purchase price is prima facie its value as warranted.—Moline Plow Co. v. Wilson, Okla., 176 Pac. 970.

86. **Set-Off and Counter-Claim**—Insolvency.—Insolvency of a party, against whom set-off is sought, may be a sufficient ground for a court of equity to allow a set-off which is not provided for by statute.—Clark Implement Co. v. Wallace, Neb., 170 N. W. 171.

87. **Trade-Marks and Trade-Names**—Competition.—The law does not favor monopolies, and honest competition should not be stifled or prevented.—Young & Chaffee Furniture Co. v. Chaffee Bros. Furniture Co., Mich., 170 N. W. 48.

88. **Trusts**—Expenses of Trust Fund.—A trust fund must bear the necessary expenses of its administration, and one who conducts a litigation for the benefit of such fund must be protected in distribution of it for the expenses incurred by him in the faithful performance of his duty.—McDonald v. Etna Indemnity Co., Conn., 105 Atl. 331.

89.——Resulting Trust.—The mere fact that parties foolishly made a void agreement will not defeat a resulting trust.—Koehler v. Koehler, Ind., 121 N. E. 450.

90. **Usury**—Purging.—An indebtedness tainted with usury may be purged of usury, and, when evidenced by a new, different, and clean instrument, will be enforced by the courts.—Guinn v. Security State Bank of Shawnee, Okla., 176 Pac. 898.

91. **Vendor and Purchaser**—Arm's Length.—Where vendor and vendee have equal knowledge or means of knowledge, and where nothing is done by the vendor to throw the purchaser off his guard, and there is no concealment of facts known to vendor, but not to vendee, mere representations of values are matters of opinion, and not of fact.—Pound v. Clum, Mich., 170 N. W. 41.

92.——Executory Contract.—A vendor may maintain an action in ejectment against a vendee in possession under an executory contract of purchase, when the vendee is in default.—Lonsdale v. Reinhard, Okla., 176 Pac. 924.

93.——Option.—An "option" is neither a contract of sale nor an agreement to sell land, or other property, being a contract by which the owner of property invests another with exclusive right to purchase it at a stipulated sum within a limited or reasonable time, imposing no obligation to purchase.—Howard v. D. W. Hobson Co., Cal., 176 Pac. 715.

94. **Vendor and Vendee**—Marketable Title.—A vendor contracting to convey realty "by a good and marketable title free and clear of all incumbrances" must have and tender a title free from all incumbrances, and not dependent for its validity upon any doubtful questions of fact, so as to subject purchaser to hazards of litigation.—Simpson v. Klipstein, N. J., 105 Atl. 218.

95. **Wills**—Nonresidence.—Where a nonresident will was ordered recorded in this state, it would relate back, and would authorize the execution of a deed by the executor prior thereto.—Vaught v. Williams, N. C., 97 S. E. 737.

96. **Witnesses**—Interrogation by Court.—The court's interrogation of witness during a trial is not error, and, in its discretion, it may aid in eliciting material matter suggested by the evidence.—Going v. Shelton, Okla., 176 Pac. 962.